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No. 90

In the Supreme Court of the United States

GLADYS JORDAN,

Petitioner,

v.

STATE OF LOUISIANA,

Opponent.

BRIEF IN OPPOSITION IN BEHALF OF THE STATE OF LOUISIANA

JACK P. F. GREMILLION,
Attorney General.

SARGENT PITCHER, JR.,
District Attorney.

RALPH L. ROY,
Assistant District Attorney.

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ARGUMENT

The bill of information herein charges petitioner with the violation of LSA R.S. 40:1033(4), which provides:

> "The following shall be unlawful:
> "(4) The actual or constructive possession or control of a barbiturate or a central nervous system stimulant by any person, unless such person obtained such drug on the prescription of a practitioner, or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use; * *"

Petitioner contends herein that that is no evidence to support the conviction in this record, and that therefore, the conviction deprives her of due process of law under Section I of the Fourteenth Amendment to the

Constitution of the United States and under the jurisprudence as established by this Honorable Court in *Thompson v. City of Louieville*, 362 U.S. 199, 80 Sup. Ct. 624, and *Garner v. State of Louisiana*, 368 U. S. 164, 82 Sup. Ct. 248. Although the State of Louisiana readily agrees that due process of law under Section I of the Fourteenth Amendment to the United States Constitution does prohibit the conviction of one of a crime without any evidence to support that conviction, the State does not agree that this record presents such an impediment to her conviction. The petitioner states in her application to this Honorable Court, as this record will confirm, that five (5) tablets were taken pursuant to a search warrant from her home by the local police authorities (R-98 et seq. and pages 6 & 7 of petitioner's application herein); that these tablets were transported to the Louisiana State Police Crime Laboratory for analysis (R-103 and page 6 of petitioner's application herein); that Mr. Travis Owen, a chemist with the Louisiana State Police Laboratory, ran a qualitative analysis on these tablets (R-63 and page 7 of petitioner's application herein), and that this chemist found the five (5) tablets to contain phenobarbital which in his opinion was a central nervous system depressant or somnifacient (see page 7 of petitioner's application herein). Petitioner claims that the chemist did not make a quantitative analysis of the amount of barbiturate present in these tablets. However, the chemist did testify that he found the five (5) tablets examined by him to contain phenobarbital, a barbiturate. Although the chemist did not make a quantitative

analysis of these tablets in a direct manner, he did so in a relative manner. From a chemical analysis of the tablets he found them to be the same as the chemicals found in a known reference tablet called bellergal. One Dr. Hansen, a defense witness, testified that bellergal contained 40 milligrams of phenobarbital, 6/10 milligrams of ergotamine and 4/10 milligrams of belladonna alkaloids. The chemist testified that the presence of these other materials was not of a sufficient degree or nature or quantity to prevent the use of these tablets as a somnifacient. Dr. Hansen could not testify that these tablets were obtained by petitioner on a prescription issued by him to her. It will thus be seen that there is ample evidence to support the law with which petitioner was charged and convicted in the State Court; that this record is not completely devoid of any evidence whatsoever to support the requirements of the offense under which petitioner was charged and convicted. And therefore the requirements of due process in that respect were met by the State of Louisiana.

Article VII, Section 10 of the Louisiana Constitution of 1921 provides in part that the appellant jurisdiction of the Louisiana Supreme Court shall extend to criminal cases on questions of law alone. Thus, in view of the foregoing cited constitutional provision, the Louisiana State Supreme Court does not inquire into the sufficiency of evidence and it is only where there is a total lack of evidence of an essential element of the offense charged that the Court is justified in setting aside the conviction as a matter of law. *State v. Alnerico*, 1957, 232 La. 847, 93 So.2d 334.

Phenobarbital is a derivative of barbituratic acid and as such is a barbiturate regardless of the presence of other ingredients effecting its quality as a hypnotic or somnifacient drug. A State Supreme Court Justice on the refusal of a rehearing herein, and petitioner herein also contend that the testimony of Dr. Hansen was uncontroverted. However, it will be readily ascertainable from the record that the chemist testified categorically that the presence of other material in these tablets did not prevent their use as a hypnotic or somnifacient drug. It is of significance to note that when Dr. Hansen was asked whether or not bellergal was prescribed as a somnifacient that he did not answer categorically that it was not, but merely said:

> "A. Not by me." (See page 9 of petitioner's application herein.)

The question of course revolving around whether or not there were other materials to prevent the use of the drug as a hypnotic or somnifacient is a matter that comes by way of defense. *LSA R. S. 40:1034* provides:

> "Nothing in this Sub-part shall apply to any coumpound, mixture, or preparation containing, in addition to a barbiturate or a central nervous system stimulant, a sufficient quantity of another potent drug or drugs to prevent its use as (1) a hypnotic, or (2) a somnifacient or (3) a central nervous system stimulant, as the case may be. Acts 1952, No. 296, § 3."

LSA R. S. 40:1044 provides:

> "In any complaint, information or indictment, and in any action or proceeding brought for the en-

> forcement of any provision of this Sub-part, it shall not be necessary to negative any exception, excuse, proviso or exemption contained in this Sub-part, and the burden of proof in any such exception, excuse, proviso or exemption, shall be upon the defendant. Acts 1952, No. 296, § 13."

If the Court were to accept favorably to petitioner the absence of evidence on this issue of whether or not the other materials present in these tablets would prevent its use as a hypnotic or somnifacient, then this would be detrimental to the defendant, that is petitioner herein, since the burden was upon her to prove that she came within the exemption. Petitioner in essence is not complaining that the State has not provided evidence to sustain its conviction and that the record so reflects, but rather she is complaining because the Court did not accept the testimony of her witness, Dr. Hansen, to the exclusion of the testimony of the chemist on that one particular issue of whether or not a sufficient amount of other material to prevent these tablets from being utilized as a hypnotic or somnifacient drug was present. Rule 19, Paragraph 1, Subsection (a) of this Honorable Court's Rules provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not thereto-

> fore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Thus, for the reasons heretofore stated, it is respectfully submitted that the writ herein sought by petitioner should not be granted because the record herein reflects that there is ample evidentary foundation supporting her conviction.

Petitioner herein also contends that her conviction under the law allegedly is violative of the due process clause of the Fourteenth Amendment in that the said law fails to give her adequate notice of what conduct is or is not proscribed against. Specifically she avers that the utilization of the words "sufficient quantity" is vague and indefinite. Although a similar contention was made by counsel in the State Court, the specific complaint herein was not so made. The complaint made and passed upon by the State Court was that the words "hypnotic or somnifacient drug" were not defined in the law and therefore violative of Article I, Section 10 of the Louisiana Constitution of 1921 and violative of the equal protection clause of the Fourteenth Amendment of the Constitution to the United States. This Court will not pass upon issues on certiorari or on appeal which have not been presented to and passed upon by the State Court. LSA R. S. 40:1033 the law with which petitioner was charged under and particularly paragraph 4 thereof making it unlawful to actually or constructively possess or control a barbiturate and considering the definition of

barbiturate under LSA R. S. 40:1032, the complained of terminology "sufficient quantity" does not appear. The terminology "sufficient quantity of another potent drug" appears in LSA R. S. 40:1034 relative to exemptions which under LSA R. S. 40:1044 come by way of defense and need not be avered in the charge nor negated by the State in the charge. Therefore, if there is any substance to petitioner's contention, it would merely obliterate the exemption provided for in LSA R. S. 40:1044 all to her detriment and would not affect LSA R. S. 40:1033(4) which is the statute under which she was charged, tried and convicted.

CONCLUSION

For the reasons herein set forth, it is respectfully submitted that the petition for writ of certiorari to the Supreme Court of the State of Louisiana be denied.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

SARGENT PITCHER, JR.,
District Attorney,
19th Judicial District Court.

RALPH L. ROY,
Assistant District Attorney,
19th Judicial District Court.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief in opposition has been served on (1) Sam J. D'Amico, 610 Reymond Building, Baton Rouge, Louisiana, (2) Ossie B. Brown, 218 St. Louis Street, Baton Rouge, Louisiana, Attorneys for Gladys Jordan, and (3) The Supreme Court of the United States, by depositing the same in the United States Mail, with first class postage, prepaid, properly addressed.

BATON ROUGE, LOUISIANA, this 29 day of November, 1965.

Ralph L. Roy

RALPH L. ROY